Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum Through the Elimination of Barriers to the Development of Secondary Markets	)))	WT Docket No. 00-230

PETITION FOR RECONSIDERATION AND CLARIFICATION

Verizon Wireless submits this Petition for Reconsideration and Clarification of one of the rules adopted in the Commission's *Secondary Markets Order.*[1] As written, Section 1.9040(a)(i) is overly broad and will discourage parties from using the lease process, undermining the public interest benefits the Commission sought to achieve.

Section 1.9040(a) of the new rules implementing the *Order* requires that all leases include five specific provisions.[2] The only explanation the *Order* supplies for mandating these provisions is that "the public interest is best served if a licensee's or lessee's regulatory obligations and responsibilities are clearly preserved during bankruptcy."[3] This rationale, however, does not justify the breadth of the first such required provision. As currently written, the business risks associated with that provision will discourage potential lessees from entering a lease.

Section 1.9040(a)(i) states, "The spectrum lessee must comply at all times with applicable rules set forth in this chapter and other applicable law, and the spectrum

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[1] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 00-230 (rel. Oct. 6, 2003) ("*Order*").
[2] *Id at* ¶189 and at §1.9040(a).

leasing arrangement may be revoked, cancelled or terminated by the licensee or Commission if the lessee fails to comply with the applicable requirements." Including this language in the lease would mean that the *licensee* could terminate the lease for the lessee's failure to comply with *any* of the Commission's rules – or any "other applicable law" – regardless of the seriousness or materiality of the violation or the licensee's culpability, and regardless of a lessee's potential ability and desire to cure. Moreover, the licensee could terminate the lease based on the lessee's violation of a law that the Commission itself does not enforce, because the rule is not limited to violations of the Communications Act or Commission rules. The provision is thus clearly overbroad.

Even if the Commission adopted this provision purportedly to resolve issues of the licensee retaining control over the license in bankruptcy, it allows the licensee to exercise this authority at *all* times, not just if a lessee enters bankruptcy or receivership. Moreover, licensees are motivated to ensure that their rights to the license are preserved not only if a lessee enters bankruptcy but in all situations.

The provision is not only unnecessary, but also forces parties into an arrangement regarding a subject that is better left to private negotiation. Parties to leases and other agreements routinely negotiate at arm's length the various situations that can lead to terminating the agreement, what notice must be provided, and what cure procedures are available. There is no reason for the Commission to intrude through this rule into that negotiation.

Worse, the rule will have a serious chilling affect on the secondary market for leased spectrum, undercutting the *Order's* goal to promote this market. No lessee is

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[3] *Id.* at ¶189.

likely to enter an agreement and make the investments in network infrastructure that will put the spectrum to productive use as intended by the *Order,* if it must run the risk that its lease can be summarily terminated by the licensee if and when economic circumstances make it no longer in the licensee's interest to honor a leasing arrangement, using as the pretextual basis some failure of compliance that may be completely insignificant in its nature.

The Commission is fully protected by preserving *its* right to cancel the lease should the lessee violate Commission rules. For these reasons, the Commission should remove the words "the licensee or" from Section 1.9040(a)(i). Alternatively the FCC could clarify that it did not intend to create an absolute right of termination in the licensee that could not be limited by provision in a lease.

Second, Verizon Wireless requests that the Commission clarify that this provision in defining the Commission's right to terminate a lease is subject to the normal forfeiture procedures that it outlines in the *Order*. With respect to spectrum leasing generally, the Commission states that it "will also hold spectrum lessees independently accountable for complying with the Act and the Commission's policies and rules, potentially subjecting them to enforcement action, such as admonishments, monetary forfeitures, and other administrative sanctions."[4] With respect to *de facto* leases, the Commission again is clear that lessees assume primary responsibility for ensuring compliance, but that they will be brought "within the scope of our direct forfeiture procedures under Section 503(b) of the Act."[5] Furthermore, the Commission indicates that lessees will be treated in the same manner as licensees, that is, they will be expected

[4] *Id.* at ¶12, *see also* ¶137-138

to bring their operations into compliance,[6] and will be subject to monetary forfeitures pursuant to Section 503(b)(1).[7] These procedures are in place to ensure that the Commission may take enforcement action, while preserving parties' due process rights and their opportunity to present facts that weigh against punitive action. Section 1.9040(a)(i), however, makes no reference to these important procedures. The Commission should thus clarify that its authority to cancel a lessee's authorization as outlined in Section 1.9040(a) will be subject to the normal notice, forfeiture and other enforcement procedures that are already applicable to licensees.

Respectfully submitted,

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[5] *Id.* at ¶137.
[6] *Id.* at ¶138.
[7] *Id.*